

Appendix F

Wisconsin Sentencing Guidelines

Notes

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Notes

Table of Contents

Introduction.....	1
Worksheet format.....	2
Notes format.....	3
Section I Offense Severity Assessment.....	3
Section I-A Determine factors affecting the severity of the specific statutory offense	3
Sexual offenses	3
First degree sexual assault Wis. Stat. 940.225	3
Second degree sexual assault Wis. Stat. 940.225(2).....	5
First degree sexual assault of a child Wis. Stat. 948.02(1)	5
Second degree sexual assault of a child Wis. Stat. 948.02(2).....	6
Armed robbery Wis. Stat. 943.32(2).....	7
Robbery Wis. Stat. 943.32(1)	7
Burglary Wis. Stat. 943.10(1)	7
Possession with intent to deliver cocaine- 1 gram or less proposed Wis. Stat. 961.41 (1m)(cm)1g.....	8
Possession with intent to deliver THC (marijuana) (200-500 grams) proposed Wis. Stat. 961.41 (1m)(h)2.....	9
Theft – more than \$10,000.....	9
Forgery Wis. Stat. 943.38(1); and forgery uttering Wis. Stat. 943.38(2)	9
Section I-B Assess harm caused by the offense.....	9
Section I-C Defendant’s role in the offense.....	10
Section I-D Statutory aggravating factors and penalty enhancers	10
Statutory aggravating factors	10
Offense committed in association with a gang	10
Penalty enhancers.....	11
Pleaded and proved penalty enhancers	11
Uncharged or dismissed penalty enhancers	11
Use of a dangerous weapon.....	11
Section I-E Other factors related to offense severity.....	12
Abuse of a position of trust or authority.....	12
Conduct reflects more serious conduct than the offense of conviction.....	12
Section II Risk assessment evaluation.....	12
Section II-A Factors that may suggest heightened/lesser risk	13
Age.....	13
Alcohol or drug dependence and treatment	13
Character	14
Employment history.....	14

Mental health, treatment and counseling.....	14
Performance on bail	14
Physical condition.....	14
Prior acts	15
Ties to family and community.....	15
Section II-B Criminal history.....	15
Section II-C Assessing criminal history	15
Absence of criminal history.....	16
Age of convictions	16
Definition of conviction includes adjudications of delinquency.....	16
Definition of legal status.....	16
Definition of violent offenses	17
Intervening events.....	17
Multiple convictions for closely related crimes.....	17
Unrelated conduct.....	18
Section II-C-1 Lesser risk	18
Section II-C-2 Medium risk	18
Section II-C-3 High risk.....	18
Sexual offenses and future risk	19
Section III Specific offense charts	19
Section IV Adjustments to ranges in the sentencing charts.....	19
Section IV-A Punishment is needed in the form of incarceration.....	20
Section IV-B Additional factors that may warrant adjustment of the sentence.....	20
Acceptance of responsibility; co-operation with authorities	20
Attorneys' recommendations	20
Collateral consequences.....	20
Effect of multiple counts.....	20
Habitual criminality	21
Read-in offenses.....	21
Restitution paid at great sacrifice.....	21
Section V Imposition of sentence	21
Extended supervision.....	21
Boot camp	22

Wisconsin Sentencing Guidelines

Notes

Introduction

The Wisconsin Sentencing Guidelines (Guidelines) are advisory, and are to be applied consistent with case law¹ and applicable statutory authority, specifically Wis. Stat. 973.01(1) for the following offenses if committed on or after December 31, 1999:

- first degree sexual assault, Wis. Stat. 940.225 (1)
- second degree sexual assault, Wis. Stat. 940.225 (2)
- first degree child sexual assault, Wis. Stat. 948.02 (1)
- second degree child sexual assault, Wis. Stat. 948.02 (2)
- armed robbery, Wis. Stat. 943.32 (2)
- robbery, Wis. Stat. 943.32 (1)
- burglary, Wis. Stat. 943.10 (1)
- possession with intent to deliver cocaine-1 gram or less,
[proposed statute Wis. Stat. 961.41 (1m)(cm)1g]
- possession with intent to deliver THC (marijuana)
200 to 1000 grams
[proposed statute Wis. Stat. 961.41 (1m) (h) 2]
- theft- more than \$10,000
[proposed statute Wis. Stat. 943.20(1) and (3)(c)]
- forgery, Wis. Stat. 943.38 (2),
and forgery uttering Wis. Stat. 943.38(2)

These Guidelines remain effective until the Wisconsin Sentencing Commission (Commission) issues permanent advisory guidelines or otherwise determines.

The Guidelines consist of two parts: the Wisconsin Sentencing Guidelines Worksheets (Worksheets) for each of the offenses listed above and the Wisconsin Sentencing Guidelines Notes (Notes). While the Worksheets and Notes reference many factors frequently considered at sentencing, they are not intended to preclude consideration of additional or alternative factors. Furthermore, since the Guidelines are advisory, and are not intended to replace the traditional exercise of discretion, the sentencing court is not required to address each of the factors listed in the Worksheet, or addressed in the Notes, but is encouraged to weigh all relevant factors. Failure to consider one or more Guidelines factors is not, in and of itself, abuse of discretion. The standard of appellate review is not affected by the Guidelines.

The Worksheets serve a dual purpose. They are designed to guide the sentencing court and the parties at sentencing, and to gather information for the Commission. Since information recorded in the Worksheets may be used in formulating permanent advisory guidelines, the court

¹ See generally, *Harris v. State*, 75 Wis. 2d 513 (1977); *Bastian v. State*, 54 Wis. 2d 240 (1972); *McCleary v. State*, 49 Wis. 2d 263 (1971). (*these italics in earlier version*)

should record accurately those factors relied upon at sentencing. The Worksheets should not be used in a mechanical fashion inconsistent with the exercise of judicial discretion.

Use of the pronoun “he” in the Notes is a matter of convention and convenience.

Worksheet format

The top portion of each Worksheet contains a box requesting statistical information. This portion should be filled out by the presentence investigation report (PSI) writer or by another person designated by the court in advance of sentencing.

The substantive portion of the Worksheet is divided into five principal sections, which are as follows:

- I-Offense severity level
- II-Risk assessment
- III-Specific offense chart
- IV-Adjustments to indicated sentence
- V-Imposition of sentence

The Guidelines are premised in part on the notion that many, though not all, factors that are appropriate to consider at sentencing are associated primarily with offense severity (the vertical axis of the chart) or risk assessment (the horizontal axis). The concept of offense severity pertains to the character of the offense itself. Offense severity is described as mitigated, intermediate and aggravated. The risk assessment of the horizontal axis refers to the risk to public safety or to re-offend posed by the defendant. Risk assessment is described as lesser, medium or high.

Many of the appropriate considerations necessary to evaluate offense severity and risk are listed in Sections I and II respectively of the Worksheets, and are further described in the corresponding portions of these Notes. After making determinations associated with offense severity and risk, the specific offense chart found at Section III of each Worksheet provides guidance on appropriate sentencing ranges. The Guidelines recognize that some factors, while difficult to identify as directly related to offense severity or future risk, are nevertheless valid sentencing considerations, and may support adjustment of the sentence. These factors are found at Section IV. Finally, Section V refers to the actual imposition of sentence.

Notes format

The Notes are to be used with the Worksheets, defining some terms and enlarging an understanding of the concepts referenced in each Worksheet. The structure of the Notes follows that of the Worksheets. Litigants are encouraged to consult the Notes and to direct the sentencing court's attention to sections that are applicable to a particular case.

Section I Offense Severity Assessment

Section I of the Worksheet addresses issues related to offense severity, the vertical axis of the Guidelines chart. In assessing offense severity, the court evaluates the gravity of the offense that the defendant committed, and determines whether the offense should be treated as mitigated, intermediate or aggravated. This may include weighing various factors, such as the character of the act itself, its actual or intended impact upon the victim and the community, the defendant's role in the offense, and other factors. *The offense severity axis of the sentencing chart reflects the need for punishment based on the wrongfulness of the defendant's conduct.*

Section I-A pertains to factors associated with individual offenses, and is different for each offense. Sections I-C to I-E refer to factors that are generally relevant to most offenses.

Section I-A Determine factors affecting the severity of the specific statutory offense

Consult the specific offense section below:

Sexual offenses

Worksheets are available for four sexual offenses: first and second sexual assault and first and second-degree sexual assault of a child. The following portion of the Notes discusses factors that may be relevant to these offenses. In some respects, the factors the court should consider in imposing sentence on these four offenses are similar. These offenses all involve a sexual assault, which involves consideration of the harm suffered by the victim. Of course, some factors are quite different. Depending on the circumstances of a particular case, the court may find that a factor discussed in the Notes in connection with one form of sexual assault is applicable to another form, and may rely on it in assessing offense severity.

First degree sexual assault Wis. Stat. 940.225 (1)

To assess offense severity, the court should consider the nature of the assault itself. The offense of first degree sexual assault encompasses a range of conduct from sexual contact to sexual intercourse. The court should examine the nature of the conduct itself to determine the nature of the assault. Ordinarily, touching the victim over clothing is considered a less aggravated form of this offense than sexual intercourse. In evaluating the character of this offense, the court may consider the duration of the assault, and whether it involved multiple acts, even if only one count was charged.

In evaluating the severity of this offense, the sentencing court should also consider:

- bodily harm beyond the assault itself
- other forms of harm
- transmission of disease, and the actual disease transmitted
- pregnancy
- the degree of force used
- threats to the victim
- abduction or restraint of the victim
- location of the assault
- the kind of weapon involved, if any, and the manner in which it was used
- degradation of the victim

With respect to the use of a weapon, the sentencing court may consider the nature of the weapon, and the manner in which it was used. Factors associated with the character of the weapon, and the use to which it was put, may be considered to increase or decrease offense severity. However, the mere use of a weapon, without further analysis, may not be treated as a factor that increases offense severity in any offense where the use of the weapon is an element of the offense. This is so because in those circumstances the use of the weapon is already accounted for in the Guidelines chart.

The court may consider the relationship between the defendant and the victim, but an assault in which the victim and the defendant know each other should not, for that reason alone, be treated less seriously. This issue must be considered carefully in the context of specific facts.

The court should examine information available at sentencing in connection with psychological, emotional, bodily or other harm to the victim. Some victims may suffer lifelong from this offense; others may recover more quickly. The time between the offense and sentencing may not be sufficient to assess long term harm. The court should consider impact to the individual victim; this may be demonstrated by the victim's statements as well as information regarding the victim's response to the crime. Some victims feel the need to move, others are no longer free to go certain places, or engage in certain activities. Yet others may be unable to work, have a relationship, or engage in other social contacts. Reports, if any, of family members, treatment providers, or others who know the victim well may provide valuable insights.

Under the Guidelines, the court must determine whether the particular offense is mitigated, intermediate or aggravated. The presence or absence of any factor, in and of itself, does not mean that the offense should be classified as more or less severe. In sum, because of the variety of factors that may be present in connection with a particular offense, determination of the offense severity of a sexual assault is particularly delicate and complex. The Guidelines are intended to assist in this complex task.

Second degree sexual assault Wis. Stat. 940.225(2)

Many of the offense severity factors described in connection with first degree sexual assault are appropriate to consider in connection with second degree sexual assault. For that reason, the Notes section on first-degree sexual assault should be consulted.

However, the elements of first and second degree sexual assault are different, and the difference must guide the manner in which the factors are weighed. Consider, for instance, the use of a weapon to carry out an offense resulting in a conviction for second degree sexual assault. Since the use of a weapon is not a necessary element of second degree sexual assault, the use of a weapon during the commission of an offense that results in conviction for second degree sexual assault must be analyzed differently than the use of a weapon during the commission of an offense that results in conviction for first degree sexual offense based on the use of the weapon.

First degree sexual assault of a child Wis. Stat. 948.02(1)

As in first and second degree sexual assault, determination of offense severity requires analysis of the nature of the assault itself. Generally, sexual intercourse or bodily intrusion may cause more harm than sexual contact. A touching over the victim's clothing may cause less harm. This factor should be carefully considered, however, in the context of factors, including:

- age of the victim
- bodily harm beyond the assault itself
- other forms of harm
- transmission of disease, and the actual disease transmitted
- the degree of force used, if any
- threats to the victim
- abduction or restraint of the victim
- location of the assault
- the kind of weapon involved, if any, and the manner in which it was used
- efforts to preserve the assault by the use of photographs or videotapes
- psychological manipulation of the victim

The court should also bear in mind that the fact that the victim is under 13, without further analysis, may not be treated as a factor that increases offense severity. This is so because that fact is an element of the offense, and so is accounted for in the Guidelines chart. With respect to the age of the victim, the court should consider that, by its nature, this offense involves an assault upon a victim whom the defendant knows is vulnerable. This does not imply, however, that the court may not consider factors associated with age to assess offense severity. While younger children are ordinarily considered more dependent than older children, and hence arguably more vulnerable, age alone is not a true measure of the child's degree of vulnerability or of the harm done to the child.

Another factor the court may consider is whether the defendant ordered or advised the victim to maintain silence; threatened the victim, abducted or restrained the victim. The court should also consider whether force was used, and the degree of force.

In some child sexual assault cases, there are reliable indicators that the victim has suffered multiple sexual assaults over a long period of time. Even if the defendant is convicted of only one count, the court may consider the duration of sexual abuse. The court may consider the relationship between the defendant and the victim, but should not conclude from this fact alone that an offense between persons who know each other is necessarily less harmful.

Given the age of the victim of first degree sexual assault, pregnancy of the victim is unusual, and therefore it is not a factor that the court is likely to encounter. However, the court is not precluded from considering pregnancy in a case where the victim became pregnant as a result of the assault, and the harm this may cause to her and to her family.

The court should examine information available at sentencing in connection with psychological, emotional, bodily or other harm to the victim. Some victims may suffer lifelong from being victimized sexually as children; others may recover more quickly. Most victims will confront this issue at various times in their lives. It is therefore highly unlikely that the duration of psychological harm will be known by the time of sentencing. As with adult victims of sexual assault, reports, if any, of health care providers and family members, or others who know the victim well, may provide valuable insights when assessing harm to the victim.

Under the Guidelines, the court must determine whether the particular offense is mitigated, intermediate or aggravated. The presence or absence of any factor in and of itself does not mean that the offense should be classified as more or less severe. In sum, because of the variety of factors that may be present in connection with a particular offense, determination of the offense severity of child sexual assault is particularly delicate and complex. The Guidelines are intended to assist in this complex task.

Second degree sexual assault of a child Wis. Stat. 948.02(2)

The distinction between first and second degree sexual assault is based on the age of the victim. Therefore, offense severity factors for second degree sexual assault are often similar to those associated with first degree sexual assault of a child. While the discussion of offense severity factors associated with first degree sexual assault of a child is not repeated here in its entirety, the court should turn to that section (above) for guidance.

Some second degree sexual assault offenses involve a defendant who is relatively close in age to a victim at the upper ranges of the definition of a child. The court may consider the age of the defendant and of the victim, whether the victim acted voluntarily though legal consent was impossible, and whether the defendant and the victim were adolescents involved in a voluntary sexual relationship. A related issue is that victims of second degree sexual assault may become pregnant as a result of the assault, and that pregnancy at an early age has long-term consequences for the victim and the community.

Under the Guidelines, the court must determine whether the particular offense is mitigated, intermediate or aggravated. The presence or absence of any factor in and of itself does not mean that the offense should be classified as more or less severe. In sum, because of the variety of factors that may be present in connection with a particular offense, determination of the offense severity of child sexual assault is particularly delicate and complex. The Guidelines are intended to assist in this complex task.

Armed robbery Wis. Stat. 943.32(2)

In assessing the severity of an armed robbery, the court should consider the character of the specific crime. To the extent this can be determined, the court should determine the manner and nature in which a weapon was used, and the duration and location of the robbery. The court may consider the value of items taken, though many times the loss is less consequential than the traumatic impact of this offense to the victim.

The court may consider the type of weapon used. An armed robbery may involve the use of a toy or pretend weapon, such as a hand in the pocket. When a toy or pretend weapon is used, in some sense the actual danger posed is less than when a real firearm is used, but the degree of anxiety suffered by a victim may be just as great. And, depending on the circumstances, there is always the risk that even when a toy weapon is used, the degree of actual danger will vary based upon others' response. Therefore, the court should weigh related factors, such as the degree and duration of force or threat of force, and whether any threats were made.

Generally speaking, aggravated robberies may involve one or more of the following characteristics: the use of a loaded firearm, perhaps an illegal weapon such as a sawed-off shotgun; the firing of the weapon; a mask; or a great degree of force.

Robbery Wis. Stat. 943.32(1)

The severity of a robbery is related to the degree and nature of the force used, its duration and location. While it is appropriate to consider the value of items taken, the value of the loss may be less consequential than the traumatic impact of this offense to the victim.

The degree of force involved, and its duration, is relevant to offense severity. A robbery carried out by verbal threats of force in order to take a relatively small amount of money, such as a student's lunch money, is of a different character than one in which the victim is beaten. In other words, a mitigated robbery may involve minimal threat of force, short duration and no injury; an intermediate robbery, a greater degree or threat of force; and aggravated forms of robbery, the use of a weapon, a mask, or a greater degree of force or injury.

Burglary Wis. Stat. 943.10(1)

Analysis should include factors such as the harm to the individual victim, the value of items taken or damaged, and damage to the burgled premises.

Harm to the victim is more fully described in Section I-B below, but with respect to burglary, the court may consider specifically the type of premises burgled, and the crime intended upon entry, if known. Burglary of a dwelling is ordinarily considered more serious than burglary of a garage or commercial structure. This is because burglaries of dwellings ordinarily have a stronger and longer lasting impact on the victim. Burglary of a dwelling, the purpose of which was to steal or to assault sexually, may make the victim feel unsafe, even at home, for many years to come. By contrast, burglary of an open garage accompanied only by the theft of an item of small value may have little or no long-lasting effect on the victim.

Burglary of a commercial structure is often treated as less severe than of a dwelling. However, the nature of the burglary of a commercial structure or of a garage may in some instances cause substantial harm. For instance, the burglary of a business that was vandalized or otherwise incapacitated from functioning may cause the business severe economic and other consequences far beyond the value of stolen items.

Burglaries that involve a confrontation with occupants may be more traumatic to the victim than the burglary of an unoccupied structure. The judge may consider the nature of the confrontation, and related concepts, such as whether the confrontation was intended or reasonably certain to occur, and the circumstances of the confrontation.

The court may also consider whether the defendant abandoned the burglary after unlawful entry. For example, the burglar, who, upon entry, discovered that the premises were occupied and left, may have caused less harm than the burglar who, upon discovery of the occupants, persisted in his crime.

Possession with intent to deliver cocaine- 1 gram or less proposed
Wis. Stat. 961.41(1m)(cm)1g

A mitigated offense is generally possession with intent to deliver without any indicia of dealing for profit. The intended delivery is to friends or acquaintances, or an accommodation or favor to others.

An intermediate offense is generally one of possession with intent to distribute for profit, even though the profit margin may be small. Indicia of dealing and profit have historically included beepers and cell phones, but with the proliferation of these items in society, they have become, in and of themselves, much less reliable indicators of dealing. Beepers and cell phones may be analyzed with caution in the context of reasons given for their possession and the manner in which they were purchased.

An aggravated offense is generally an offense associated with a fortified drug house; or in a location where there are other kinds of controlled substances, luxury items or weapons; or possession in the presence of children; or possession with intent to use the drug to secure sexual activity from another person. Possession with intent to deliver drugs to secure sexual activity includes, for example, paying a prostitute with drugs, or supplying drugs to an addicted person in a direct exchange for a sexual act, or supplying drugs to incapacitate or debilitate another person to induce them to engage in sexual activity.

Association with gangs or ongoing involvement in a drug distribution network is an important consideration when assessing the offense severity of a drug offense.

Another consideration is the location where the possession with intent to deliver took place. Consistent with the historic concern for regulating licensed premises, the court should consider whether the offense was conducted in whole or in part on premises licensed for the sale of alcoholic beverages.

Finally, the court should consider the impact of the offense on the community and neighborhood in assessing offense severity.

**Possession with intent to deliver THC (marijuana) (200 - 500 grams) proposed
Wis. Stat. 961.41 (1m)(h)2**

Considerations associated with offense severity for possession with intent to deliver marijuana are similar to those for possession with offense severity for possession with intent to deliver less than one gram of cocaine, and the court may turn to that section of the The court should also consider the impact of the offense on the community and neighborhood in assessing offense severity.

Theft - more than \$10,000 proposed Wis. Stat. 943.20(1) and (3)(c)

In assessing the severity of this offense, the court may consider not only the value of the property taken, but its impact upon the victim, and the relationship between the victim and the defendant. The court may consider how the defendant gained access to the property taken, the degree of planning necessary to execute the offense, and whether this was a continuing offense (though with only one conviction). Additional considerations include the motive and the use that the defendant made of the property that was taken.

Forgery Wis. Stat. 943.38 (2); and Forgery uttering Wis. Stat. 943.38(2)

The considerations applicable to offense severity are similar to those involved in a theft and the preceding section should be consulted. In connection with the degree of planning involved, the court may consider the sophistication, or lack of sophistication necessary to accomplish the forgery.

The court may consider that an offense motivated by an urgent need for necessities such as rent may differ in severity from one motivated by a desire for luxury items, addiction to prescription or illegal drugs, or simply by greed.

Section I-B Assess harm caused by the offense

The sentencing court should address the impact of the crime upon the victim, and the individual victim's statement and needs. These factors may bear not only upon the offense severity assessment, but also upon conditions of probation or extended supervision.

To the extent that it has not already been fully considered in connection with Section I-A above, the court should address any vulnerabilities of the victim, how these may have affected the harm done to the victim, and whether the defendant was aware of the vulnerabilities.

Again, to the extent that it has not already been considered fully in connection with Section I-A above, the court should evaluate the impact of the crime on the victim. This includes consideration of any harm suffered by the victim. It may be bodily harm, as defined in Wis. Stat. 939.22(4), as well as the psychological, physical, and financial impact of the crime on the victim and the victim's family or property.

The court may also take into account whether a neighborhood or community has suffered harm as a result of the defendant's conduct.

Section I-C Defendant's role in the offense

In assessing the severity of an offense involving more than one offender, the court may consider the defendant's role in the offense. Generally, a finding that a defendant was a leader or organizer, or was in a position of authority suggests that the defendant's offense severity level should be increased. Similarly, a finding that the defendant's role was minimal, or that the defendant was pressured or manipulated by others suggests that the defendant be placed in a lower offense severity level. However, this determination should be made in the context of all factors bearing upon the severity of the offense.

Section I-D Statutory aggravating factors and penalty enhancers

Statutory aggravating factors

In connection with the recommendations of the Criminal Penalties Study Committee (Committee), several former penalty enhancers were recast as statutory aggravating factors. Since the statutory aggravating factors represent former penalty enhancers, sentencing courts should consider them with great care. The presence of a statutory aggravating factor generally should result in placing the offense at a higher offense severity level.

Offense committed in association with a gang

Gang association, formerly a penalty enhancer, is now a statutory aggravating factor. Facts demonstrating that the offense was related to gang activity or other forms of organized criminal activity may increase the severity of the offense. Association with a gang may affect the impact of the crime on the victim and the community. Gang membership may constitute a form of intimidation that facilitates the commission of the crime, and discourages the victim from resisting or reporting the offense. For example, a small shop owner in a neighborhood where gangs are active may be reluctant to resist or report a theft by a gang member. In those cases, gang affiliation affects the severity of the offense. However, the offense should not automatically be treated as more severe simply because, unrelated to the offense and its impact on the community, the defendant was associated with a gang.

Penalty enhancers

When pleaded and proved as required by law, penalty enhancers increase the maximum penalty. There are several penalty enhancers that may apply to the offenses discussed in these Notes:

- Dangerous weapon Wis. Stat. 939.63
- Hate crime Wis. Stat. 939.645
- Violent crime in school zone Wis. Stat. 939.632
- Domestic abuse Wis. Stat. 939.621
- Drug offense within 1,000 feet of school, park, multi-unit public housing project, correctional facility, and other places specified by statute Wis. Stat. 961.49
- Drug Distribution to persons under age 18 Wis. Stat. 961.46

The court should consult the specific statute to evaluate its applicability.

Pleaded and proved penalty enhancers

When a defendant has been charged with a crime to which a penalty enhancer has been added, and has been convicted thereof, the maximum possible penalty for the crime is increased. In these cases, the presence of the penalty enhancer should generally result in placing the offense at a higher offense severity level. The court may also increase the maximum penalty in each of the cells of the sentencing chart to accommodate the fact that the statutory maximum for that offense has been increased by operation of the penalty enhancer. Consistent with this, the sentence imposed may be higher than the sentence set forth in the highest cell of the sentencing chart.

Uncharged or dismissed penalty enhancers

When a penalty enhancer has not been charged, or has been dismissed, but the circumstances of the defendant's crime fit the description of a penalty enhancer, the offense severity should be evaluated in the same manner as it would when a statutory aggravating factor is present. The court should consider the existence of these circumstances with great care, and should generally place the offense at a higher offense severity level.

Use of a dangerous weapon

The use of a dangerous weapon is referenced at various points in the Notes. For instance, depending on the particular offense involved, use of a weapon may have been addressed in Section I-A of the Notes. However, in order to avoid redundancy and confusion, use of a dangerous weapon appears in the Worksheet only in Section I-E.

As with other penalty enhancers that are not pleaded or proved, the court should consider the existence of a weapon used to commit or facilitate the commission of an offense with great care. The court may also encounter circumstances where the proof is insufficient to charge or to prove the dangerous weapon enhancer, but may nevertheless conclude that, in connection with

other circumstances, the weapon is highly relevant to offense severity. In those circumstances, the court should check the dangerous weapon penalty enhancer as uncharged or dismissed. In evaluating the proper weight to give to the use or presence of a weapon, the court should carefully consider factors such as the connection between the weapon and the offense, the nature of the weapon and its use.

Section I-E Other factors related to offense severity

This section contains other factors related to offense severity.

Abuse of a position of trust or authority

The abuse of a position of trust, taking advantage of a position of authority, or making use of a special skill or license in order to commit the crime are factors that may increase the severity of the offense

Conduct reflects more serious conduct than the offense of conviction

At times, the underlying conduct reflects conduct more serious than the offense of conviction. For instance, as a result of plea negotiations, the defendant may have been convicted of second degree sexual assault of a child although the child victim was under the age of 13. The court may consider this in assessing offense severity.

Section II Risk assessment evaluation

Section II of the Worksheet contains factors that are useful in assessing the risk that the defendant poses to public safety or to re-offend. Risk assessment involves evaluation of factors indicative of risk and of criminal history. *The risk assessment axis of the sentencing chart reflects the need to incapacitate the defendant to safeguard public safety; risk assessment pertains to the likelihood of re-offense.*

To assess future risk, the court may evaluate the character of the offense itself, just as the offense itself was analyzed to determine offense severity. Using burglary as an example, the court may consider that there are different kinds of burglaries, and their different characteristics may reveal information relevant to assessing whether the defendant will commit another burglary or re-offend in another way. For instance, a burglary may have been opportunistic, as when a defendant, not having planned to commit the crime, passes by an open garage door, sees a bicycle and impulsively steals it. Depending on other factors known about the defendant, the court may determine that this impulsive act may, or may not be, a fair predictor of re-offense.

The reason why a defendant entered the premises may itself be indicative of future risk. A burglary may be retaliatory, that is, aimed at a particular victim to get even, to intimidate or to coerce. Depending on the particular circumstances, a defendant involved in this kind of offense may pose no risk to commit another burglary, but may pose a risk to commit another, perhaps even more serious offense. The defendant may be involved in a volatile relationship where there

is future risk of violence. However, when viewed in the context of other factors, the court may conclude that the burglary represents anomalous conduct, and that the defendant is unlikely to re-offend.

A crime may be mischievous or thrill-seeking, with no purposes other than to cause damage. Depending on other circumstances, this may be a predictor of re-offense. A defendant who enters premises for the purpose of committing a sexual assault may pose a significant risk to re-offend, though not necessarily with a burglary. An examination of factors affecting the risk for future sex offenses may be more appropriate in such a situation.

Factors related to the manner in which the burglary was executed, or to the defendant's background and history, may suggest that the burglary was professional. A professional burglar poses a significant risk to re-offend.

In other words, the court may evaluate the character of a particular offense, whether it is burglary or another crime, to determine what it reveals about future risk to public safety or to re-offend. With respect to the horizontal axis of the chart, the purpose of evaluating the character of the offense, the offender, and other factors listed below, including criminal history, is to assess the degree and nature of the risk that the defendant poses to individual victims and to the community. The court ultimately must decide whether the defendant poses a lesser, medium or high risk to public safety or to re-offend.

Section II-A Factors that may suggest heightened/lesser risk

Section II-A lists factors that may be considered in assessing risk.

Age

The defendant's age is frequently related to the risk to re-offend. With the exception of sexual offenses, adolescents and young adults commit most crimes. That is, as people age, they tend to stop committing crimes. Therefore, a burglar in his late thirties or forties may pose a great risk to re-offend; aging has not stopped him from breaking the law.

The effect of age on criminal behavior is not as clear when a sexual assault is involved. For instance, pedophiles tend to pose a risk to re-offend throughout their lives.

Alcohol or drug dependence and treatment

The court may consider whether the defendant committed the offense while under the influence of an intoxicant or a controlled substance, whether the defendant is dependent on alcohol or controlled substances, or whether there is a history of alcohol or drug abuse. Anecdotal and statistical evidence reveals a high correlation between many crimes and a dependence on alcohol or drug dependence. The defendant may remain a significant future risk unless his alcohol or drug dependence has been, or can and will be effectively addressed. Previous unsuccessful courses of treatment may reflect on risk to reoffend.

Character

In assessing risk, the court may consider whether the nature of the defendant's character suggests that the offense of conviction is an anomaly. It is generally preferable to evaluate character in the context of a demonstrated history of good conduct.

Employment history

Evidence of employment that enables the defendant to support himself and his family is generally an indication of reduced risk of re-offend. This is particularly true when the offense had a financial motive.

A record of stable employment is of even greater significance than employment at the moment of sentencing. A history of employment, depending on other factors, may indicate a lesser risk to re-offend. The defendant's employment history may also be relevant when setting conditions of probation or extended supervision.

Mental health, treatment and counseling

Issues related to mental health merit careful consideration. If previously untreated, a defendant's commitment to a course of treatment and medication may be an indicator of lesser risk. However, at times a history of mental illness, particularly if coupled to violent conduct, may reveal heightened risk. These factors may be considered when setting conditions of probation or extended supervision.

Performance on bail

Performance on bail may be treated as an indicator of future risk. The defendant's conduct may indicate that he can be supervised adequately in the community. Obviously, evidence of negative urine screens and of compliance with conditions of pre-trial release, if any, tend to reflect favorably.

Whether the offense for which the defendant is being sentenced was committed while he was on bail on other charges is a factor that the court may consider. For instance, the fact that a defendant is released on bail for operating a motor vehicle while under the influence of an intoxicant, and then commits a sexual assault, also while under the influence of an intoxicant, is reflective of high risk. However, if, while on bail release for forgery a defendant is arrested for operating a motor vehicle without a driver's license, the bail violation is less closely associated with risk.

Physical condition

Consider whether the defendant's physical condition affects the ability to supervise him. For instance, a person who is confined to a wheelchair may pose a lesser risk of violent conduct.

Prior acts

The court may consider wrongful conduct even if it did not result in conviction. However, the court should bear in mind that conduct that fell short of conviction might be insufficiently reliable to be relevant to future risk.

Consider whether a defendant's prior wrongs affect the risk that the defendant will re-offend or cause harm of the public in the future. At times, previous acts have resulted in arrest but not conviction. The court should evaluate the number and reason for the arrests. A court may conclude that it is appropriate to treat misconduct that has resulted in arrest as more serious than misconduct that has gone undetected. This is because, depending on the circumstances, the fact of arrest may fairly constitute a warning to the defendant that his conduct is wrongful and should stop. When conduct has gone undetected, the effect of arrest or conviction on future risk has not been demonstrated. It may be that arrest itself will reduce future risk to re-offend. However, this is not to suggest that the court should never consider previous undetected misconduct.

Prior acts may also include previous read-in offenses if indicative of future risk, or may have little to add to the risk analysis. For instance, if the defendant has a burglary conviction and there was a read-in for the theft of items stolen at the time of the burglary, the read-in for the theft has relatively little to add in predicting risk; the burglary conviction already reflects the conduct. However, a read-in for criminal damage to property for vandalism during the course of the robbery may be informative of future risk.

Ties to family and community

The presence of a strong and stable relationship with family, as well as strong ties to the community in which the defendant lives and works, may be considered when assessing risk. A supportive and committed family may reduce the risk posed by the defendant. This factor may also be relevant when setting conditions of probation or extended supervision.

Section II-B Criminal history

This section requires that all of the defendant's previous convictions, whether felonies or misdemeanors, be listed on the Worksheet or attached. This section should be prepared before sentencing by the PSI writer or another person designated by the court. The PSI writer may copy and attach the portion of the PSI that lists previous convictions and adjudication of delinquency.

Section II-C Assessing criminal history

The Guidelines direct that criminal history be treated objectively in a manner consistent with the groupings found in the Worksheet and described below under Sections II-C-1, II-C-2 and II-C-3. However, in those cases where criminal history understates or overstates the defendant's risk to public safety or to re-offend, the sentencing court should make appropriate adjustments to the risk assessment axis. Included among the factors that may distort criminal history and warrant adjustment of the groupings described at Sections II-C-1, II-C-2 and II-C-3 are:

- Absence of criminal history
- Age of convictions
- Intervening events
- Multiple offenses for closely-related crimes
- Unrelated convictions

Absence of criminal history

Criminal history is an important consideration in assessing future risk to public safety or to re-offend. The absence of a criminal history does not, in and of itself, lead to an inevitable conclusion that the defendant should be placed in the lesser risk category. In some instances, a bare reference to criminal history may be an inadequate indicator of risk. For instance, prior acts and read-in offenses not resulting in conviction (discussed in Section II-A above) may be predictive of future risk. In the case of a burglary where the defendant entered for the purpose of committing a sexual assault, the burglary conviction may be an inadequate indicator of the risk posed by the defendant.

Age of convictions

The age of the prior convictions, as well as the age of the defendant at the time of the past and present conviction, affect the risk assessment. As already stated, the age of the defendant in itself affects the risk to re-offend. Generally, the more distant the past conviction or behavior is from the present offense, the less reliable indicator it is of future risk to re-offend or to public safety. (A significant exception to this are sexual assault offenses, which must be very carefully treated no matter how old the conviction or the offender.) Of course, lapse of time between the previous offense and the present crime is less meaningful in those situations where the defendant has been incarcerated and thus unable to re-offend outside of a correctional institution. In those instances, it is more appropriate to evaluate the lapse of time from release to the community and re-offense.

Definition of conviction includes adjudications of delinquency

For purposes of these Guidelines, the word “conviction” means a criminal conviction or an adjudication of delinquency for an act that would have been a crime if committed by an adult. Similarly, any reference to a “felony” or a “misdemeanor” includes crimes so classified by statute as well as any adjudication of juvenile delinquency that would have been a felony or misdemeanor if committed by an adult.

Definition of legal status

Legal status means that at the time of the offense, the defendant was:

1. on probation for any felony or violent misdemeanor (as defined above); or
2. on parole; or
3. on extended supervision; or
4. subject to juvenile supervision following adjudication for an act that would have been a felony or a violent misdemeanor if committed by an adult; or

5. an escapee; or
6. an absconder; or
7. an inmate serving a sentence; or
8. a juvenile under a secure corrections disposition.

The court may consider whether or not the defendant was on bail at the time of the offense, but bail release does not fall within the definition of legal status. See Notes Section II-A, Performance on bail.

The commission of a crime while on some form of legal status generally means that community supervision was insufficient to control the defendant's risk to re-offend. In light of this, the court should consider whether a correctional agency could adequately supervise the defendant in a manner consistent with public safety. A person who has been the subject of close supervision in the community, but who nevertheless re-offends, may have demonstrated that no degree of community supervision will suffice to protect the community

Definition of violent offenses

Violent offenses include any misdemeanor or felony (or juvenile offense for an act that would have been a misdemeanor or felony if committed by an adult) that involved:

1. the use or threat of use of force. This definition of "violent" assumes a person-to-person confrontation; or
2. the sexual assault of a child; or
3. the use or possession of a dangerous weapon as defined in Wis. Stat. 939.22(10).

Intervening events

Events intervening between earlier convictions or conduct and the present offense may affect the risk assessment. Consider whether the defendant, since his previous crimes has availed himself of rehabilitative resources successfully, continued with his education, obtained an educational degree, established a history of stable employment, and lived in a manner consistent with the public good.

Multiple convictions for closely related crimes

Where the defendant has multiple previous convictions, the court should be informed whether these were the product of a single event or course of conduct; or were distinct, discrete occurrences. This does not mean that simply because multiple crimes are closely related in time they should be disregarded. For example, four armed robbery convictions resulting from a single occurrence where four victims were present may be viewed differently than four convictions that resulting from four separate armed robberies occurring over four consecutive days, or even during the course of the same day. In sum, the court should analyze convictions flowing from closely related conduct to insure that the convictions are not used in a manner that overstates risk.

Unrelated conduct

The sentencing court should examine the defendant's criminal history in the context of the present offense to determine whether prior convictions are relevant predictors of future risk. For instance, when imposing sentence for a burglary, the fact that the defendant recently committed another burglary or burglaries is highly relevant to the risk to re-offend. In certain circumstances, a recent conviction for a controlled substance offense, even a misdemeanor or citation, may be more indicative of risk because, depending on the circumstances, it may be a reliable indication of risk to re-offend. This is so because of the correlation between substance abuse and burglary. By the same token, conviction for a violent offense may, in some instances, be a less reliable indicator of future risk. A burglary defendant who has a battery conviction might be at a lower risk to re-offend than a person with a recent non-violent misdemeanor conviction. For example, if the felony battery was the result of a schoolyard fight many years before, when the defendant was an adolescent, but who has been crime free since the felony battery conviction might not be a reliable indicator of future risk. This is not to say that the felony battery conviction should be wholly disregarded, rather, that it should be weighed carefully to determine whether it is predictive of future risk.

Section II-C-1 Lesser risk

Generally, lesser risk assessment is strongly suggested when at the time of the offense the defendant had no legal status and no criminal history; or no legal status and convictions for non-violent misdemeanors only; or no legal status and a conviction for one non-violent felony.

Section II-C-2 Medium risk

Generally, medium risk assessment is strongly suggested when the defendant is being sentenced for a non-violent felony committed while the defendant was on legal status; or when the defendant has been convicted once before for the same or a similar offense; or when the defendant has a criminal history for two or three violent misdemeanors, or for two or three non-violent felonies, or one violent felony

Section II-C-3 High risk

Generally, high risk assessment is strongly suggested when a defendant is being sentenced for a violent felony committed while the defendant was on legal status; or when the defendant has been convicted two or more times for the same or a similar offense; or when the defendant has a criminal a history for two or more violent felonies or four violent misdemeanors.

The above descriptions of lesser, medium and high risk are not an exhaustive compilation of the varieties of criminal history records that a sentencing court might encounter. In those circumstances where a defendant's criminal history is not precisely reflected in any of the descriptions embodied in Sections II-C-1, II-C-2 and II-C-3, the court may analogize to these descriptions of risk to determine whether the defendant should be placed in the lesser, medium or high risk categories.

Sexual offenses and future risk

Time and resource constraints precluded the Committee from identifying all risk factors associated with sex offenses. The Committee encourages the permanent Wisconsin Sentencing Commission to identify more precise sexual offense risk factors. Sentencing courts may consider risk factors associated with sex offenders not referenced in these Notes, including the insights of credible experts in this area.

Section III Specific offense chart

Section III of the Worksheet includes a chart with nine cells. The offense severity level is the vertical axis of the chart and the horizontal axis represents future risk to public safety or to re-offend. The structure of the chart is not intended to indicate that the total number of offenders should be distributed equally among the nine cells. The distribution of offenders will vary by offense. It may be that in connection with one offense, almost all defendants will fall within the low risk/mitigated offense category. Similarly, it may be that few defendants will be placed in the aggravated offense severity/high risk offender cell. The aggravated offense severity level/high risk offender cell accommodates the highest sentence possible for the worst case offender.

Section III of the Worksheet also includes information regarding the percentage of defendants placed on probation for the specific offense during the previous five years. This information is included in order to provide information regarding the frequency with which probation has been used for the particular offense.³

After determining whether the offense severity level is properly described as mitigated, intermediate or aggravated, and whether the defendant presents a lesser, medium or high risk to public safety or to re-offend, the court should place the defendant in the corresponding cell of the specific offense chart. This provides the sentencing court with a sentencing range.

Section IV Adjustments to ranges in the sentencing chart

The Guidelines envision analysis of most factors relevant to sentencing as related either to offense severity or risk assessment. However, some factors that may be legitimately argued and considered at sentencing are difficult to describe as related to either of these considerations. Section IV references factors that may warrant adjustment of the sentence indicated by the specific offense chart.

³ Cautionary note: Statistics regarding the number of defendants placed on probation are derived from Department of Corrections database. They do not incorporate the C-CAP database, and may be incomplete.

Section IV-A Punishment is needed in the form of incarceration

Though a defendant may otherwise be a candidate for probation, considerations of retribution or deterrence not fully accommodated by the preceding sections of the Guidelines may lead the sentencing court to impose a term of incarceration, either as a condition of probation or in prison. The court should state the reasons for deviation from the sentencing range indicated in the sentencing chart.

Section IV-B Additional factors that may warrant adjustment of the sentence

The following factors are not always related to offense severity level or future risk. They may nevertheless lead a court to adjust the sentence.

Acceptance of responsibility; co-operation with authorities

The court may find it appropriate to reduce the sentence when the defendant accepts responsibility for the offense; or expresses genuine remorse, to the extent that this can be determined; or demonstrates that he has learned a lesson from the experience; or has provided valuable services to law enforcement authorities.

Attorneys' recommendations

The court may give weight to the recommendation given by the attorney, particularly if the reasons for the recommendation are set forth at sentencing and the court finds that they are well founded.

Collateral consequences

At times, defendants suffer collateral sources of punishment from having been charged or convicted of an offense. Collateral punishment may take the form of the loss of a job or professional license or certification with long-lasting financial consequences, public humiliation, and loss of property (as in a forfeiture action). The collateral consequences of conviction may be considered by the court and may mitigate a sentence. However, undue weight to collateral consequences could have the unintended effect of unfairly benefiting wealthier defendants.

Effect of multiple counts

Imposition of sentence on multiple counts may require upward adjustment if the sentences are imposed concurrently or downward reduction if sentences are imposed consecutively.

Habitual criminality

When an allegation of habitual criminality is established at or before sentencing, the court may determine that a sentence in excess of the maximum penalty is required, and may impose such a sentence as provided for in the habitual criminality statute (Wis. Stat. 939.62) or the drug repeater statute (961.48).

Read-in offenses

Read-in offenses may cause the sentencing court to deviate upward, or to set different conditions of probation or extended supervision.

Restitution paid at great sacrifice

The payment of restitution is related to acceptance of responsibility and to remorse. When restitution is paid before sentencing, the court may give favorable consideration. However, care should be taken to analyze the financial resources of the defendant. At times, restitution is paid by family members whose financial resources are so great that payment means less than a smaller payment by an individual with limited resources.

Section V Imposition of sentence

Extended supervision

When a sentence of incarceration is imposed, or imposed and stayed, the court must impose a term of extended supervision of at least one quarter of the period of incarceration. The length and conditions of extended supervision, if the court deems that special conditions in addition to standard conditions of supervision are appropriate, must be determined as part of the sentence.

The length of extended supervision should be sufficient to protect the community and may also serve to punish the defendant. Considerations related to the re-integration of the defendant into the community, payment of restitution, rehabilitation and other special needs, such as the need for treatment or counseling that might not be met in a correctional setting, may influence the court's decisions regarding extended supervision. Sentencing courts should not automatically impose a maximum term of extended supervision. In many circumstances, a term of extended supervision of one year or one quarter the term of incarceration, whichever is greater, may suffice to serve the proper ends of extended supervision. However, with certain kinds of offenses, such as child sexual assault, the sentencing court may wish to set a longer period of extended supervision. Ordinarily, the length of extended supervision should be no less than one year or one quarter of the term of incarceration, whichever is greater.

Boot camp

In order for the defendant to qualify for boot camp, the court must announce this at the time of sentencing. Boot camp has the effect of reducing the period of incarceration.